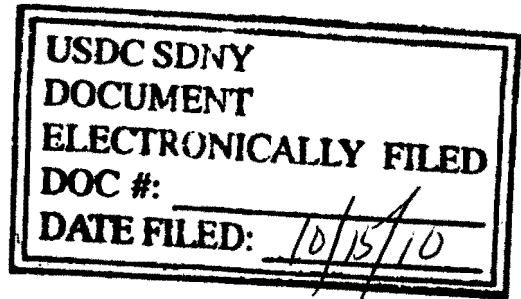


MAILED TO COUNSEL



UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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In re Application of Vera Moreno :
:
-----X
LOUIS MILBURN, :
:
Plaintiff, :
:
v. :
THOMAS A. COUGHLIN, III, et al., :
:
Defendants. :
-----X

79 Civ. 5077 (LAP)
FINDINGS OF FACT AND
CONCLUSIONS OF LAW

LORETTA A. PRESKA, Chief United States District Judge:

FINDINGS OF FACT

I. The Parties

Plaintiff John Vera

1. Plaintiff John Vera was an inmate at Green Haven Correctional Facility ("Green Haven"), a facility run by the New York Department of Correctional Services ("DOCS"), from approximately May 2003 to September 16, 2010. (Tr. 29:6-8 (Vera); DOCS Inmate Lookup, available at <http://nysdocslookup.docs.state.ny.us/kingw00>; Ex. 20 at 580-81.)¹ Vera received parole for good behavior in prison and is currently on probation.

¹ All references to "Tr." refer to the transcript of the hearing conducted on September 22 and 23, 2010. Except where noted, references to "Ex." refer to Vera's exhibits.

(Tr. 29:11-15.) If he violates the terms of his probation, he will return to Green Haven as an inmate.

(Tr. 29:20-23.)

Defendants

2. Defendant Frederick Bernstein is the Facility Health Services Director of Green Haven. (Joint Stipulation of Facts ("Joint Stipulation"), Ex. A to Pretrial Order, ¶ 3.) In that position, he has ultimate responsibility for the entire Green Haven Medical Department, including primary care physicians and the Medical Records Department. (Id.; Tr. 172:5-22 (Bernstein).)

3. Defendant Hari Chakravorty is a clinical physician at Green Haven. (Tr. 95:25-96:1.) From approximately early 2005 until Vera's discharge from Green Haven on September 16, 2010, he was Vera's primary care physician. (Tr. 43:18-44:2 (Vera); Ex. 33 (referencing Dr. John Bendheim on 12/17/2004); Ex. 34 (referencing Dr. Hari Chakravorty on 3/22/2005).)

4. The remaining named defendants, Brian Fischer, Lester Wright, Robert Ercole, Carl Koenignsmann, E.J. Licerio, and Chabra Vinot, are all employees or officials of DOCS and/or of Green Haven and thus are

successors to the original defendants under the Stipulation for Entry of Modified Final Judgment by Consent ("Consent Decree") § I(4), Milburn v. Coughlin, 79-cv-5077 (S.D.N.Y. Sept. 30, 1991).

II. Vera's Condition

Vera's Pituitary Adenoma

5. Vera has a medical condition called pituitary adenoma, which is tumor on the pituitary gland in the brain. (Medical Problem List, Ex. 21, at 618.) A pituitary adenoma is a serious condition that can disturb normal pituitary function, causing myriad severe side effects throughout the body, including loss of vision and seizures. 4 Gale Encyclopedia of Medicine 2913-14 (2006 ed.).

6. As Defendants have conceded, Vera's condition "could be fatal" if not properly treated. (Bernstein Declaration, Ex. 3.) The condition, and the care it requires, is complex. (Tr. 144:11-12 (Chakravorty) (admitting that Vera's care is "quite complicated").)

Chronology of Vera's Condition

7. In the 1980s, Vera had a pituitary adenoma that caused him to lose his vision. (Tr. 30:5-31:10 (Vera).) Vera's doctors recommended immediate

neurosurgery to remove the tumor, and Vera was operated on within a matter of months. (Tr. 31:13-24 (Vera).) After the surgery, Vera's symptoms entirely disappeared; he required no medications and no longer required glasses. (Tr. 32:11-15 (Vera).)

8. However, while incarcerated in the New York DOCS system (but before his incarceration at Green Haven), Vera began again to experience symptoms similar to those that preceded the diagnosis of his first brain tumor. (Tr. 33:15-34:3 (Vera).) He was not given a diagnosis but was prescribed cortisone. (Tr. 34:15-22 (Vera).) At least by the time Vera was transferred to Green Haven's custody in May 2003, Vera's physicians were aware that his tumor had regrown. (See, e.g., Ex. 75 (noting "regrowth of pituitary tumor").)

9. Prior to his incarceration at Green Haven, Vera was incarcerated for approximately a year at Clinton Correctional Facility. (Ex. 21.) While at Clinton, Vera was sent to an endocrinologist named Dr. James Desemone. (Tr. 37:22-25 (Vera); Exs. 25, 27, 74). Dr. Desemone requested Vera's medical records to investigate the extent to which his tumor had recurred, and whether it should be treated by surgery,

but was not provided them. (Tr. 38:16-40:4 (Vera); Ex. 25 ("We need more details I need records"); Ex. 74.) Dr. Desemone also wrote, and conveyed to Vera, that he might need surgery in the imminent future. (Ex. 27 ("Would recommend neurosurgical evaluation re. potential for repeat surgery"); Tr. 38:22-39:4 (Vera).)

10. While being treated by Dr. Desemone, but before the needed investigation could be completed, Vera was transferred to Green Haven. (Tr. 41:1-3 (Vera); Ex. 20, at 580-81 (indicating transfer between 3/26/03 and 5/29/03).) His initial primary care physician was Dr. John Bendheim, whom Vera understood to be concerned about his symptoms, including broken bones. (Tr. 41:4-43:17 (Vera).) Dr. Bendheim prescribed Fosamax to Vera, which Vera understood to be intended to remedy the consequences of his long-term use of cortisone. (Id.)

11. Around 2005, however, Vera was transferred to Dr. Chakravorty as his primary care physician. (Tr. 43:25-44:2 (Vera).) Dr. Chakravorty was dismissive of Vera's complaints, failed to order appropriate follow-up care, and was abusive toward Vera. (Tr. 44:3-46:9

(Vera).) Indeed, Vera requested that a correctional officer supervise all of his evaluations by Dr. Chakravorty. (Tr. 45:23-46:9 (Vera); Tr. 86:21-87:12 (Vera Cross).)

12. Throughout his incarceration at Green Haven, the symptoms and health conditions that Vera experienced as a result of his prior surgery and of the recurrence of his pituitary adenoma worsened considerably. (Tr. 46:10-15. (Vera).) In addition, there was evidence during that time that Vera's tumor was growing, (Ex. 32, at 316-18 ("The height of the pituitary lesion has increased")), that it was mineralizing or calcifying (Ex. 59; Tr. 52:13-53:2 (Vera) (testifying that doctor at Westchester Medical Center stated that tumor was calcifying)), and that it was impairing Vera's vision (Ex. 51 (describing results of visual fields test as being "consistent with the presentation of a pituitary tumor")).

Symptoms Suffered by Vera

13. Vera suffers from a multitude of symptoms. (Motion for Contempt Order ("Motion"), Ex. 1 (listing symptoms); Motion, Tab G (grievances attaching list of symptoms). Among the most severe conditions and

symptoms suffered by Vera are hormonal deficiencies (having a variety of effects), losses of consciousness, vision loss, and low bone density resulting from long-term hormone replacement (resulting in bone fractures).

14. Vera has severe hormonal deficiencies. ((See, e.g., Ex. 21, at 618 (listing hypothyroidism as "medical problem" suffered by Vera); Tr. 97:15-24 (Chakravorty) (describing "deficiency in many, many hormones in the body").) For someone with such deficiencies, continued monitoring by an endocrinologist is critical. (Tr. 98:4-5 (Chakravorty) (testifying that "there may be a re-growth of the pituitary tumor, but that is followed mostly by the endocrinologist and by MRIs"); Tr. 227:23-228:19 (Bernstein) (explaining that endocrinologists monitor the care of patients following pituitary surgery and evaluate medication for hormonal imbalances and whether they are working or not working).)

15. Endocrinologists have prescribed medications to treat Vera's hormonal deficiencies, and those medications, as well as their dosages and their side

effects, must be monitored very closely. (Tr. 146:12-25 (Chakravorty) (describing adjustments to dosages over time, and that endocrinologist must determine proper medications); Tr. 126:17-127:3 (Chakravorty) (listing medications taken by Vera at a certain point in time).)

16. Vera has experienced a number of episodes in which he lost consciousness. (Tr. 46:15-16 (Vera); Tr. 106:1-3 (Chakravorty).) Some of these have resulted in serious injuries to him. (Tr. 46:17-18.) For example, in May 2006, he lost consciousness while lining up for breakfast, fell forward, hit his face on the floor, and fractured the bone around his eye socket. (See, e.g., Tr. 49:2-53:10; Ex. 132 (Unusual Incident Report); Ex. 80 (Ambulatory Health Record ("AHR") entry); Exs. 55, 56, 57, 58 (records from Westchester Medical Center); Ex. 133 (FHS1 trip/triage report).) Vera was hospitalized and required surgery. (Id.) In August 2009, Vera again lost consciousness and fell, causing further severe injury to his face. (Tr. 54:1-56:22 (Vera); AHR, Ex. 22, at 120; Ex. 69 (MRI report from Putnam); Ex. 72 (canceled referral noting incident).)

17. Vera has also experienced vision loss. (Ex. 50 ("[Patient] with pituitary tumor has visual field loss."); Ex. 51 (Visual field test is "consistent with presentation of a pituitary tumor"); Tr. 161:9-14 (Chakravorty) (acknowledging conclusion of vision loss).) Such loss may result from a pituitary tumor that encroaches on the optic nerve. (Tr. 118:8-12 (Chakravorty) (testifying that pituitary tumors can cause problems to the optic nerve).)

18. Vera has also suffered from dangerously low bone density, a side effect of cortisone, one of his hormonal medications. (Bone Densitometry Report, Ex. 65, at 201; Tr. 112:1-6 (Chakravorty) (noting that osteoporosis is a side effect of Vera's medication).) This puts him at severe risk of bone fractures, which he has suffered. (Tr. 42:3-4.)

19. In addition, Vera has experienced a variety of other symptoms, including muscular and joint pain, dizziness, and gastrointestinal pain. (See, e.g., Motion Tab G (attaching symptoms list); Ex. 35 (AHR notation of dizziness); Ex. 45.)

III. Specialty Care Practices

Record-Keeping Related to Specialty Care

20. Because Green Haven does not employ medical specialists as facility staff, it refers inmates in need of specialty care to private medical providers with whom DOCS has contracted. (Joint Stipulation ¶ 17.) Referrals to such specialists originate with an inmate's primary care physician, who makes an entry on the inmate's AHR and fills out the top portion of a form called a Report and Request for Consultation ("R&ROC"). (Id. ¶ 18(a)-(b).) A carbon copy of that R&ROC travels with the inmate to the specialist appointment. (Id. ¶ 18(g).) After evaluating the inmate, the specialist writes onto the bottom portion of the R&ROC, among other information: a description of the inmate's medical condition, requests for further information, and recommendations for follow-up care. (Id. ¶ 18(h).)

21. The completed R&ROC is provided to the inmate's primary care doctor, who, under Green Haven and DOCS policy, reviews it and records any action or inaction on the specialist's recommendations in the AHR. (Id. ¶ 18(j); Health Services Policy Manual ("HSPM"), Ex.

13, at 1.43.) The original R&ROC is placed into the inmate's medical file. (Joint Stipulation ¶ 18(j).)

22. DOCS maintains a computer system called FHS1. (Joint Stipulation ¶ 14.) FHS1 contains, among other information, entries for inmates' medical appointments with specialists or with their primary care doctors. (Id.)

23. Referrals are not entered into FHS1 until they have been approved by the Regional Medical Director; if disapproved, only a paper record exists. (Kelly Dep. Tr. 98:25-100:13.) For each referral that is approved, a member of the Green Haven administrative staff creates an entry in FHS1. (Joint Stipulation ¶ 18(f).)

24. When the R&ROC containing the specialist's notes returns to Green Haven following the inmate's consultation, a clerk enters a highly abbreviated version of the specialist's evaluation and recommendations into FHS1. (Id. ¶ 18(i); Tr. 186:6-9 (Bernstein) (stating that FHS1 provides a "sometimes abbreviated reason for the consultation, and then often very abbreviated synopsis of the recommendation by the specialist"); Persson Dep. Tr. 94:8-20

(description of limited amount of space in FHS-1). These FHS1 entries may omit the specialist's recommendations. (Tr. 150:20-153:4 (Chakravorty) (observing recommendation on R&ROC that does not appear in FHS1); Kelly Dep. Tr. 131:23-133:22 (description of transcription of R&ROC recommendations into FHS1).)

25. The FHS1 summaries of specialist visits are therefore incomplete records of both the number of specialist referrals and of specialists' evaluations and recommendations.

IV. Green Haven's Failures to Refer Vera to Correct Specialists Failure to Refer for Neurosurgical Evaluation

26. As described in detail below, Green Haven has lost or destroyed the majority of Vera's medical records from before mid-2007. (See infra ¶¶ 54-59.) However, even the records that do exist demonstrate a number of deficiencies in Green Haven's care of Vera.

27. Despite the severity of Vera's condition, the ongoing possibility that his tumor would require surgical excision, the severe health effects caused by his underlying condition and his medications, and the fact that his prior tumor was treated through

neurosurgery, Green Haven only once sent him for evaluation by a neurosurgeon. (FHS1 Referral History, Ex. 20). Since that single appointment in April of 2004, Green Haven never again sent Vera for neurosurgical evaluation. (Ex. 20; Tr. 227:17-19 (Bernstein).)

28. Since that time, Vera's other doctors, including the endocrinologists with primary responsibility for monitoring his condition and the success of his treatment regime (see supra ¶ 14), repeatedly have recommended neurosurgical evaluation. Among other instances, Vera's endocrinologist specifically recommended neurosurgical evaluation in June 2005, September 2005, and January 2007. (Ex. 34; Ex. 43; Ex. 61; see also Ex. 36 (Dr. Chakravorty's notation regarding neurosurgical follow-up on June 17, 2005); Ex. 39 (recommending on June 29, 2005, referral to neurosurgery if visual fields test is abnormal, which it proved to be, see Ex. 51); Ex. 54 (recommending "neuro" evaluation on July 20, 2006); Tr. 150:20-22 (Chakravorty) (acknowledging recommendation for neurosurgery on September 21, 2005); Tr. 154:7-10

(Chakravorty) (acknowledging recommendation for neurosurgery on January 17, 2007).)

29. Green Haven failed to follow these recommendations despite repeated admissions that endocrinologists are the doctors with primary responsibility for monitoring whether Vera's treatment regime was working. (See supra ¶¶ 14-15.) Green Haven also acknowledged that in other circumstances, it followed endocrinologists' recommendations virtually reflexively. (E.g., Tr. 127:13-15 (Chakravorty) (stating he prescribed medication because the endocrinologist recommended it); Tr. 133:19-25 (Chakravorty) ("[A]ll of [the medications] I was prescribing with the recommendation of specialists."); Tr. 148:10-13 (Chakravorty) (stating he "almost always" followed endocrinologist's recommendations to prescribe certain medications).

30. Moreover, neurosurgical care was readily available. For example, neurosurgeons make specialty care visits to Coxsackie Specialty Care Clinic, where Vera repeatedly has been sent for specialty consultations, approximately once a month. (Persson Dep. Tr. 49:5-13.)

31. Due to the adverse inference granted by the Court, it is presumed that there were additional recommendations for neurosurgery that Green Haven ignored. This is consistent with the other evidence, as Vera testified that several doctors expressed their opinion that his tumor should have been treated surgically and that he should be evaluated by a neurosurgeon to explore the possibility of surgical treatment in the future. (See, e.g., Tr. 52:13-53:2 (Vera) (testifying that doctor at Westchester Medical Center expressed surprise at lack of surgical treatment and difficulty of operating after calcification); Ex. 31).

Failure to Provide Adequate Endocrinology Care

32. As described, endocrinologists have primary responsibility for monitoring a condition like Vera's. (See supra ¶¶ 14-15.) Vera was last sent to an endocrinologist on May 22, 2009. (Ex. 20.) At that visit, the endocrinologist recommended that Vera be seen again in 6-8 weeks. (Ex. 67, at 229.) However, Green Haven not only failed to return him within that time period, it never again returned him to the endocrinologist before his release on September 16,

2010. (Ex. 20.) The Facility Services Director changed the request for a follow-up in 6-8 weeks to "P.R.N.," or "as needed." (Exs. 66, 67.) No explanation of the reason for that alteration appears in the records, and the records do not indicate that any Green Haven doctor later assessed whether endocrinology care was in fact needed. This was despite the fact that in August 2009, Vera experienced a particularly serious loss of consciousness which resulted in a hospitalization (AHR, Ex. 68, at 120; Putnam Consultation, Ex. 69, at 47; FHS1, Ex. 72, at 844.)

Failure to Respond to Severe Symptoms

33. On other occasions, Vera's Green Haven physicians ignored clear signs that other specialty care was required. For example, Vera lost consciousness in October 2005 and received medical attention. (Ex. 46 (AHR noting blackout).) Despite Vera's primary care physician's own notes that he should be referred to a neurologist, he was not sent. (Ex. 47 (Chakravorty's note on 10/20/05 that Vera blacked out in October 2005 and should get neurology consult); Ex. 21 (indicating no neurology appointment).) In mid-May 2006, Vera

again requested that he be sent to a neurologist to evaluate his blackouts, but his complaints were dismissed. (Tr. 89:12-22 (Vera) ("I told him that I have the symptoms and they was too difficult for me to understand [H]e say, Ah, you don't have nothing. I see you another day. . . . And maybe two weeks later or three weeks later, that's when I got the accident that I lost consciousness and I got hurt again."); Ex. 80 (Dr. Chakravorty noting Vera's requests for care and his own refusal to provide it); Tr. 157:16-20 (Chakravorty) (noting that Vera requested to see a neurologist during that visit).) A mere two weeks later, Vera again lost consciousness, fell on his face, fractured his eye socket, and required hospitalization and surgery. (See, e.g., Ex. 132 (Unusual incident); Ex. 80 (AHR entry); Exs. 55, 56, 57, 58 (records from Westchester Medical Center); Ex. 133 (FHS1 trip/triage record).)

Failure to Provide Other Follow-Up Care

34. The limited record that exists contains other examples of follow-up care that was recommended by Vera's doctors but never provided by Green Haven. (See, e.g., Ex. 71 (recommending CTA to investigate

possibility of aneurysm); Ex. 72 (canceling referral for CTA); Tr. 53:3-14 (Vera) (description of Westchester neurologist's request that Vera return to Westchester for follow-up neurology treatment, which was never provided).)

35. The record also contains other examples of failures in care and unresponsiveness to Vera's complaints about his condition. (See, e.g., Motion at Tab G (Vera's grievances regarding suspension of prescription medications and containing his repeated correspondence to Dr. Chakravorty regarding inability to obtain prescription refills); Motion at Tab F (Vera's grievances about other aspects of medical care and Dr. Chakravorty's treatment); Tr. 164:19-21 (Chakravorty) (testifying that he does not recall Dr. Bernstein ever talking to him about Vera's complaints).)

Failure to Provide Necessary Medical Information

36. Green Haven also repeatedly failed to provide Vera's doctors with the information they needed to treat him properly. For example, Vera's MRI of his tumor in 2005 showed that the tumor was enlarging. (Ex. 32.) However, when Vera was sent for a follow-up

MRI in 2006, the radiologist reported that "No previous examination is available for comparison." (Ex. 53.) On another occasion, the radiologist evaluating Vera's bone density test also noted that "[n]o prior exam is available for comparison," despite the fact that several such exams had been conducted (Ex. 65; see Exs. 76, 77, 78 (prior reports).)

37. On numerous other occasions, Vera arrived at doctor's appointments only to find that his physicians had not been provided with the medical records they required to perform an adequate evaluation. (Tr. 38:14-39:19 (Vera); Tr. 64:18-25 (Vera).) Instead, they frequently relied on Vera's own recollection and understanding about the extent of his condition. (Tr. 63:17-22 (Vera); Tr. 87:21-23 (Vera) ("I had to provide all the information, background of what I have and what I was doing in front of the person."); Tr. 88:9-17 (Vera) (The endocrinologist "don't have no other papers to look for They have nothing else. . . . So it was difficult for me to try to explain to them how my whole condition was over ten, 15 years, and I was surprised that . . . they don't have no papers to be able to do a complete

evaluation.").) As a practice, Green Haven relies on inmates to tell their doctors at the intake if they have a pending doctor's appointment. (Kelly Dep. Tr. 86:3-19.)

38. The deficiencies described above were all evident on the face of the limited available records of Vera's medical care. By operation of the adverse inference this Court has granted, the missing records are assumed to have deficiencies in care in violation of the Consent Decree. (Tr. 263:9-264:14 (adverse inference finding).)

V. Green Haven's Loss of a Significant Portion of Vera's Medical Records

Key Categories of Records Maintained by Green Haven's Medical Department²

39. Pursuant to DOCS policy, an inmate's file at Green Haven includes at least records from previous New York State institutions where he was incarcerated. (Joint Stipulation ¶ 11; Kelly Dep. Tr. 82:9-21.)

40. The AHR contains, in chronological order, each health encounter between an inmate and a health

² Certain of these practices are memorialized in the DOCS Health Services Policy Manual ("HSPM"), described in detail infra at ¶¶ 81-85.

provider. (Joint Stipulation ¶ 8). This includes entries documenting an inmate's visits to sick call; his visits with his primary care physician, including any symptoms about which he complained; the medical treatment he received; his primary care physician's decision to adjust his care or prescriptions; and any emergency attention an inmate received. (Tr. 220:8-23, 225:11-226:2 (Bernstein).) An inmate's visits to sick call or to the infirmary would only be recorded on the AHR, not on FHS-1. (Kelly Dep. Tr. 148:24-149:21).

41. R&ROCs document visits to specialists. (See supra ¶ 20.) As described above, much of the information on the R&ROCs does not appear in the FHS-1 system. (See supra ¶ 24.) Under standard Green Haven practices, outside providers retain one copy of each R&ROC. (Kelly Dep. Tr. 125:14-20; Persson Dep. Tr. 65:12-24.)

42. Other types of documents that can be found in an inmate's medical file include records of emergency visits, lab reports, and communications from the inmate to his doctors or to medical records. (Joint Stipulation ¶ 7.)

43. On an ad hoc basis, Green Haven "thins" the active files of inmates, removing older records to an "inactive" file. (Joint Stipulation ¶ 9; Bosworth Dep. Tr. 42:21-46:7, 47:12-49:6, 133:8-135:18.) Green Haven generally maintains at least a year of records in the active file, though it can be more if the inmate has a complex condition or, alternately, if the inmate does not have many records. (Id.) Inmates' files are also thinned when the active file is "falling apart." (Id.) There is no index made of the records that are taken out of the active file. (Id.) The inactive records are kept on a separate shelf in the medical records room. (Id.)

44. Pursuant to DOCS policy, an inmate's medical chart is not moved out of the medical records room at Green Haven unless and until the inmate is paroled or dies. (Kelly Dep. Tr. 152:16-24) Only medical and medical records staff has access to medical records. (Id. at 37:21-38:14.) Green Haven has lost records before, however. (Ex. 3; Bernstein Decl. ¶ 17.) Green Haven frequently temporarily misplaces inmate files. (Healy Dep. Tr. 16:19-21:4.)

Green Haven's Practices with Regard to Inmate Review of
Records

45. Pursuant to policy, Green Haven makes records available for inmates to review upon request.

(Bosworth Dep. Tr. 136:2-11; see also Tr. 66:17-69:25 (Vera).) A request is scheduled when there is space available in the examination rooms in the medical department for a review to take place. (Bosworth Dep. Tr. 111:18-117:4.) The inmate receives a call-out to go to the clinic, reviews his record under the supervision of someone from medical records or a nurse, and indicates which records he wants copied. (Id.)

46. Inmates such as Vera pay per page for copying their medical records. (Tr. 69:17-21 (Vera); Kelly Dep. Tr. 167:5-7; Ex. 115, 118.)

47. Green Haven never gives inmates access to electronic records if the inmate does not specifically ask for them, even if an inmate requests to see all of his records, and even though the HSPM defines records as including electronic records. (Bosworth Dep. Tr. 107:23-109:8; Tr. 199:17-21 (Bernstein) (testifying that he does not know whether a request for FHS1

records has ever been made or whether inmates receive such records if they do request them).)

Green Haven's Staff's Understanding of the Consent Decree's Requirements with Regard to Medical Records

48. Dr. Chakravorty did not know that the Consent Decree pertained to him, though as an employee at Green Haven, he is specifically included within the class of Defendants and thus is bound by the Consent Decree. (Tr. 145:8-16 (Chakravorty); Consent Decree § I(4).) Dr. Chakravorty only makes notations in the AHR "sometimes" when he reviews inmate's chart. (Tr. 147:15-17 (Chakravorty).)

49. Dr. Bernstein did not view the Consent Decree as defining a "health encounter" to include a doctor's review of a patient's records. (Tr. 221:2-10.) However, the HSPM clearly states that such reviews are "encounters" and must be documented in the AHR. (HSPM, Ex. 13 at 4.1, at 6.) Dr. Bernstein admitted that the Consent Decree imposes on Green Haven the requirements of DOCS policies such as the HSPM. (Tr. 173:24-174:4 (Bernstein) (noting that the Consent Decree "basically [imposes] the medical records

requirements of the New York State Department of Correctional Services.").)

50. Dr. Bernstein lacks familiarity with the Consent Decree's medical records requirements and did not focus on the Medical Records section of the Consent Decree because he understood that Green Haven had been in compliance with those requirements. (Tr. 216:18-217:9.)

51. Betsy Kelly, who as Nurse Administrator for Green Haven supervises the entire Medical Records staff (Kelly Dep. Tr. 17:16 -18:18), was not given any special training regarding medical records when she became Nurse Administrator (Kelly Dep. Tr. 42:9-18). She does not know if the guidelines for thinning records are written down anywhere. (Kelly Dep. Tr. 42:9-18.)

52. Green Haven did not maintain appropriate levels of medical records staff pursuant to the Consent Decree at all times. (Horree Dep. Tr. 33:7-24) (describing being only employee in medical records for nearly a year).)

53. Dr. Chakravorty destroyed documents that could have shed light on Vera's symptoms (Tr. 45:1-11 (Vera) (testifying that Dr. Chakravorty crumpled up his list of symptoms and copies of medical records, calling them "garbage" and physically threw them in Vera's face)).

A Significant Portion of Vera's Records Are Missing

54. Green Haven has conceded that portions of Vera's medical records are missing. (Ex. 3, Bernstein Decl. ¶ 17 ("[P]laintiff's non-current medical records are not presently in the possession of Green Haven's medical department."); Tr. 10:9-23; Tr. 178:14-17 (Bernstein) (testifying of his awareness that some of Vera's medical records are missing).)

55. Pursuant to DOCS policy (see supra ¶ 49), the section of Vera's medical records lost by Green Haven included not only the records from the beginning of Vera's incarceration at Green Haven in May of 2003, but also records from the New York state institutions where he was previously incarcerated. Before he was incarcerated at Green Haven, Vera was incarcerated at Clinton Correctional Facility, Rikers Island, and Downstate Correctional Facility, among others. (Tr.

33:19-20, 35:22 (Vera); Ex. 21 (Medical Problem List). Vera was at New York state institutions since 1998, with the exception of some time spent in federal custody. (Ex. 21 (Medical Problem List).)

56. Among the records missing from Vera's medical file at Green Haven is the entire AHR before June 15, 2007. (Ex. 22 (active AHR); Healy Dep. Tr. 36:8-16 (acknowledgment that could not find pre-2007 AHR); Bosworth Dep. Tr. 100:22-101:7) (same).³ Vera's AHR from June 15, 2007 to February 17, 2010 documented nearly 90 encounters between Vera and Green Haven health providers. (Ex. 22 (active AHR).) Had Vera had health encounters at a similar rate before June 15, 2007, the missing sections of his AHR from Green Haven alone would have documented approximately 101 additional encounters with health care providers. Among these missing records would be records of any symptoms about which Vera complained. (Compare Tr. 222:23-226:2 (Bernstein) (admitting that symptoms would be in the AHR, which is missing), with Ex. 3, Bernstein Decl. ¶ 3 (stating that medical records

³ June 15, 2007 is approximately six months before Vera first gave notice of his intent to file this lawsuit. (Ex. 1, Tab B).

"believe plaintiff's claims," as "[m]any of the symptoms about which plaintiff complains are not documented in the medical records").) It would also include his visits to sick call, visits with his primary care physician, description of his treatment, his health providers' decision-making regarding his care, the prescriptions he received, and emergency care he received. (See supra ¶ 40.)⁴

57. Missing from Vera's records are at least dozens of R&ROCs from endocrinologists, ophthalmologists, neurologists, and other specialists. These R&ROCs contained those specialist's notes of consultation and recommendations for follow-up care. (Ex. 20 (listing specialty care visits from pre-2007 period); Tr. 225:24-226:2 (Bernstein).)

58. The records missing from Vera's file may also include records of emergency visits, certain labs, and communications from Vera. (Joint Stipulation ¶ 7.)

⁴ As counsel represented during the hearing, Vera himself was able to obtain a few selected pages of his pre-2007 AHR through Freedom of Information Law ("FOIL") requests made before Green Haven lost those records. (Tr. 182:23-183:1.)

59. Due to the adverse inference, these missing records are assumed to be favorable to Vera. (Tr. 263:9-264:14.)

Importance of Complete and Accurate Medical Records

60. Prison doctors and specialists rely on complete medical records to ensure continuity of care, as regular prison doctors see hundreds of patients, and specialists often see patients only very occasionally. (Tr. 142:10-143:9 (Chakravorty) (testifying that he had no independent recollection of care without looking at the records); Tr. 143:22-25 (Chakravorty) (agreeing that because prison doctors see so many patients, "having the records of each individual inmate's care [is] so important").)

61. Maintaining comprehensive medical records is particularly important for a patient with as complicated a health condition as Mr. Vera. (Tr. 144:13-17 (Chakravorty) ("Q: So particularly for someone with a condition as complex as Mr. Vera and with as many symptoms as Mr. Vera has experienced, keeping accurate records of his medical condition across time is particularly important, is it not? A: Yes."); Tr. 218:19-25 (Bernstein) (agreeing that

"maintenance of medical records is important to ensuring continuity of care" because "without adequate records, a treating physician may not be able to understand the other care and diagnoses of other treating physicians"); Turner Dep. Tr. 83:7-8 (noting that medical record "needs to be continuous").)

62. Even very old historical records can be relevant in a case like Vera's. (Ex. 25 (Dr. Desemone writing "We need more details on the original tumor, at next appt. I need records that include: (1) neural imaging studies, (2) pre-op pituitary hormone levels, (3) op note, (4) path report"); Tr. 41:4-43:17 (Vera) (testifying that Dr. Bendheim sought information on the history of Vera's condition); Persson Dep. Tr. 81:2-82:3 (noting that it is important for continuity of care for specialists to know what treatment an inmate had had previously, even before incarceration). (see also supra ¶ 37).)

63. The evaluations of these specialists is contextual, as the evaluation of Vera's condition may change from one appointment to the next. (Tr. 159:21-163:17 (Chakravorty) (acknowledging that available records demonstrate specialist's changing evaluation of Vera).

Vera's Access to Records

64. Green Haven never provided Vera with electronic records. (Tr. 70:21-24 (Vera) (testifying that he was never shown printouts of electronic medical records); 71:4-73:14 (Vera) (describing his specific requests for electronic records following Bernstein Declaration); Exs. 104-109 (correspondence related to Vera's requests for computer records referenced in Bernstein's declaration); Bosworth Dep. Tr. 107:23-109:8 (testifying that she never provided computer records to Vera).)

65. Green Haven never provided Vera with access to the inactive file, despite specific requests for historical records. (Tr. 66:17-69:25 (Vera); see, e.g., Ex. 109 (asking for "all petitioner actual and old records"); Ex. 120 (asking for older records).)

66. Green Haven admittedly denied Vera's access to records on some occasions. (Ex. 3, Bernstein Decl. ¶ 16 (admitting delay in providing Vera with access to medical records).)

Green Haven Did Not Diligently Search for Vera's Missing
Records After Discovering That They Were Lost⁵

67. Green Haven did not discover that the records were missing until after the lawsuit was brought, despite Vera's previous requests for documents that, in fact, Green Haven had already lost (Tr. 243:9-15 (Bernstein)) and despite the fact that it was possible to tell by looking at the chart that it was missing records, as he had so many medical problems. (Bosworth Dep. Tr. 94:13-95:2.)

68. The only person who testified to being involved in an initial search for the records was Elizabeth Horree, who admitted to having sole responsibility for medical records during the period that the records purportedly went missing. (Horree Dep. Tr. 33:7-24) (describing being only employee in medical records for nearly a year).) Horree herself testified that she did not look inside each file. (Horree Dep. Tr. 64:15-65:23.) Dr. Bernstein testified that he himself reviewed only Vera's own chart for the missing records. (Tr. 179:3-4.) Dr. Chakravorty, Vera's primary care physician -- who frequently had his chart

⁵ The diligence of the search for lost records is irrelevant. Nonetheless, as a factual matter, the search was not diligent.

in his office -- testified that he did not participate in the search. (Tr. 168:8-14.)

69. While several members of the medical records staff testified that they put out APBs, there is no evidence that anyone contacted the Cocksackie Specialty Care clinic, where Vera had received care. (Tr. 243:20-244:24 (Bernstein) (admitting that he does not know if his staff contacted Cocksackie); Tr. 168:15-19 (Chakravorty) (testifying that he did not contact Cocksackie); Bosworth, Horree Dep. Trs. (passim).) Indeed, it was not until Cocksackie belatedly responded to a subpoena issued in this case that Green Haven was aware that Cocksackie possessed copies of some of Vera's records that Green Haven had lost. (Defs. Opp. to Mot. for Adverse Inference at 6 (noting that counsel for Defendants was initially informed that Cocksackie did not retain copies of documents).)

70. No one at Green Haven ever contacted Vera's outside providers to attempt to obtain copies of the missing records. (Tr. 168:10-14 (Chakravorty); Tr. 244:25-245:5 (Bernstein) (testifying that neither he nor his staff contacted outside providers).)

71. Even once it discovered that records were missing, Green Haven did not inform Vera of that fact. (Tr. 73:21-74:3 (Vera) (testifying that no one ever told him his records were missing); Tr. 168:5-7 (Chakravorty) (testifying that when he learned records were missing, he did not tell Vera); Tr. 180:5-11 (Bernstein) (testifying that he had no recollection of telling Vera that his records were missing); 245:6-8 (same).) Dr. Bernstein also buried information regarding the missing records in his declaration to the Court, despite his knowledge some "three or four years ago" that portions of Vera's medical records were missing. (Tr. 178:14-179:13 (Bernstein); Ex. 3, Bernstein Decl. ¶ 17.)

Instead, Green Haven Retaliated Against Vera for His Lawsuit

72. Green Haven did not give Vera access to documents specifically referenced in Bernstein's declaration even after he requested those documents specifically and noted that he needed them for a lawsuit. (Tr. 71:4-73:14 (Vera) (describing his specific requests for electronic records following Bernstein Declaration); Ex. 104-109 (correspondence related to

Vera's requests for computer records referenced in Bernstein's declaration); Tr. 240:4-242:17 (Bernstein) (testifying that he does not recall Vera's requests for computerized records and "presume[s]" that he did not confirm that he received copies of those records).)

73. Both Dr. Bernstein and Green Haven disciplinary personnel spuriously accused Vera of being in altercations, when in fact his injuries resulted from his medical condition. Dr. Bernstein stated in his Declaration that Vera's injuries from his May 2006 fall were "consistent with those that would occur during an altercation with another prisoner," despite numerous medical and other records that unequivocally demonstrate that Vera injured himself after losing consciousness. (Compare Ex. 3, Bernstein Decl. ¶ 11 (stating that "the seizure was unobserved and there is no medical or other evidence that a seizure occurred"), with Exs. 55, 56, 80 (paper medical records), 133 (FHS1 record), 132 (Unusual Incident Report), and Tr. 230:1-237:5).)

74. A Green Haven correctional officer charged Vera with extortion and then intimated that he would drop

the charges if Vera would drop his lawsuit. (Tr. 56:23-63:22 (Vera); Ex. 142.) As evidence of the charge of extortion, Green Haven disciplinary personnel pointed to Vera's August 2009 injuries, which they alleged were the result of a fight with the alleged extortion victim. (Id.) After multiple correctional officers testified on Vera's behalf and presented documentary evidence that Vera was in his cell at the time of the alleged altercation, the charges of extortion were dropped for insufficient evidence. (Id.)

75. The Court finds Mr. Vera's testimony at the hearing to have been credible.

CONCLUSIONS OF LAW

I. Applicable Standards

The Consent Decree

76. Green Haven is subject to the Consent Decree. (Pretrial Order ¶ IV.B.1; Ex. 2). Green Haven entered the Consent Decree to resolve a class action litigation brought by Green Haven inmates claiming that Green Haven's provision of medical care was so deficient as to violate the inmates' constitutional rights. (Consent Decree Preamble.) The Consent

Decree governs nearly every aspect of the provision of medical care at Green Haven. (Pretrial Order ¶ IV.B.1.)

77. The Consent Decree imposes requirements related to the provision of specialty care, including by providing that Green Haven must: (1) send inmates to specialists when needed (Consent Decree § VII(B); Tr. 215:18-20); (2) provide specialty care in a prompt manner, consistent with the severity of the inmate's condition (Consent Decree § VII(D)(3).); (3) keep records of all specialty care that is provided (Id. § XIII(A)(8); Tr. 215:21-23 (Bernstein)); (4) promptly review all records of specialty consultations (Consent Decree § VII(I); Tr. 215:24-216:1 (Bernstein)); (5) where a specialist requests that an inmate be returned for follow-up care, provide that follow-up care or explain why it is not providing it (Consent Decree § VIII(G); Tr. 216:2-6 (Bernstein)); (6) document Green Haven doctors' responses to specialists' recommendations (Consent Decree § VIII(G); Tr. 216:7-9 (Bernstein)); and (7) ensure that an inmate whose diagnostic tests are abnormal receives appropriate

follow-up care. (Consent Decree § VI; Tr. 216:10-14 (Bernstein)).

78. The Consent Decree requires that "[d]efendants shall maintain an individual medical record for each inmate and fully document in the health record each encounter of the inmate with a health care provider." (Consent Decree § XIII(A).) Among other records, Green Haven must maintain an AHR "containing documentation of health care encounters in chronological order" and "consultation reports of specialists." (Id.) The Consent Decree specifies that these steps are required "[f]or the purpose of insuring maintenance of medical records that make possible continuity of care." (Id. § XIII.) As Defendants concede, this term refers generally to the idea that care should be consistent over time and coordinated among treating physicians within different specialties. (Tr. 218:13-18 (Bernstein).) The Consent Decree does not permit Green Haven to discard or destroy records. (Tr. 218:5-7 (Bernstein).)

79. In addition, Green Haven has conceded that the Consent Decree imposes on Green Haven the medical records requirements of DOCS policies. (Tr. 173:24-

174:4 (Bernstein) (noting that the Consent Decree "basically [imposes] the medical records requirements of the New York State Department of Correctional Services.").) Green Haven has also conceded that the Consent Decree requires that inmates have access to their medical records. (Tr. 174:5-7 (Bernstein) (stating that the Consent Decree's requirements "include the inmate patients having access to their medical records"); Bosworth Dep. Tr. 136:2-11 (same).)

80. The Consent Decree imposes other relevant requirements, including (1) that Green Haven maintain "6 full-time equivalent positions, including one full-time senior medical records clerk, one clerk for monitoring inventory and ordering supplies, one clerk for coordinating and maintaining the records and other documents required by this Modified Final Judgment" (Consent Decree § II(A)(8).); and (2) that "[a]ll health care records shall be securely stored when not in use." (Id. § XXIII(A)(3).)

Department of Correctional Services Policy

81. Green Haven is bound to follow DOCS policies and procedures related to health services, including specialty care, medical record-keeping, and inmate

requests for records. (Pretrial Order ¶ IV.B.2; Tr. 219:1-16 (Bernstein); Tr. 11:2-5 (Odessky).) Many of these policies are set forth in DOCS's Health Services Policy Manual (Ex. 13, HSPM).

82. DOCS policies impose numerous requirements regarding specialty care, including that an inmate's primary care physician must review specialty care consultation reports upon the inmate's return from receiving care; document the consultant's recommendations in the AHR; and document any action or inaction taken on such recommendations. (Ex. 13, HSPM § 1.43 ¶ III(A)(7).) DOCS policy also requires that certain documents "must" accompany inmates to all outpatient care appointments, including copies of prior consultation reports and relevant lab and radiology tests. (Ex. 13, HSPM § 1.43 ¶ III(A)(6).)

83. DOCS policies impose numerous requirements regarding medical record-keeping. They require that facilities keep, for each inmate, an AHR that documents all health encounters between the inmate and facility providers. (Ex. 13, HSPM § 4.1, at 6.) Encounters are defined to include not only "face-to-face" contact between provider and inmate but also

"non face-to-face encounter[s]," for example, if a provider reviews an inmate's medical chart or lab results. (Id.)

84. The Consent Decree and DOCS policy require that medical records be comprehensive and accurate, require that original medical records remain at all times in DOCS control, and prohibit destroying or discarding medical records. (Tr. 218:5-7 (Bernstein); Ex. 13, HSPM §§ 4.1, 4.4, 4.5(8), 4.6, 4.8; Consent Decree § XIII.) Defendants have conceded that this obligation extends to all of Vera's records. (Defs. Opp. to Mot. for Adverse Inference at 7 ("[D]efendants concede their obligation to preserve all of plaintiff's medical records").)

85. DOCS policies also impose requirements regarding inmate access to medical records and information. (Ex. 13, HSPM § 4.10.) They provide that, in general, an inmate has a right of access to view and/or obtain a copy of his/her health record. (Id. ¶ III(A)(1).) Among other things, the policies also provide that an inmate's "health record," to which he may obtain access, includes electronic information stored in FHS1. (Id. ¶ II(A).) The policies further provide

that if an inmate requests such records, printouts from FHS1 will be provided. (Id. ¶ IV(7).) DOCS policies also provide that each inmate has "the right to . . . complete current information concerning [his] diagnosis, treatment and prognosis in terms [he] can understand." (Id. § 1.04 ¶ 4.)

II. Standards for Awarding Relief

Consent Decree's Provision for Relief

86. The Consent Decree specifically provides that individual class members may seek relief under the Consent Decree: "In the event of individual cases of class members in which health care was not provided in accordance with this Modified Final Judgment," any class member "shall have the right," after satisfying certain procedural requirements, "to seek from the Court individual injunctive relief as well as any other remedies available in this Court under the law." (Consent Decree § XXIX(D).) An individual class member may recover under the Consent Decree "despite defendants' compliance with the Modified Final Judgment." (Id.)

Standard for Finding of Civil Contempt

87. To find a party in contempt of a court order such as a consent decree, the order must be clear and unambiguous, the evidence of noncompliance must be clear and convincing, and the evidence must show that the party has not diligently attempted to comply in a reasonable manner. N.Y. State Nat'l Org. for Women v. Terry, 886 F.2d 1339, 1351 (2d Cir. 1989).

88. A party's violation of a court order need not be willful for a party to be found in civil contempt. NLRB v. Local 282, Int'l Bhd. of Teamsters, 428 F.2d 994, 1001 (2d Cir. 1970); cf. Hathaway v. Coughlin, 37 F.3d 63, 66 (2d Cir. 1994) (noting that even deliberate indifference to serious medical needs under the Eighth Amendment requires "less than conduct undertaken for the very purpose of causing harm").

89. A civil contempt sanction may serve either to coerce the contemnor into future compliance or to compensate the complainant for losses resulting from the contemnor's past noncompliance. Terry, 886 F.2d at 1352.

Adverse Inference

90. The Court has found that Vera is entitled to an adverse inference as to the contents of the medical records that Green Haven had an obligation to preserve and failed to preserve at least negligently (if not more culpably). (Tr. 263:9-264:14.) Thus, as a matter of law, Vera benefits from "an inference that the lost records would have helped [him] demonstrate his case." (Tr. 264:13-14.)

III. The Provisions of the Consent Decree Concerning the Provision of Specialty Care and the Maintenance of Medical Records Are Clear and Unambiguous

91. As described above, the Consent Decree sets forth specific and detailed requirements concerning Green Haven's provision of specialty care and the maintenance of medical records.

92. These provisions are not open to interpretation, and, indeed, Defendants have not argued that they are. Defendants' representatives have concurred with Vera's interpretation of several crucial provisions of the Consent Decree and have advanced no alternate interpretation of any others. (See, e.g., Tr. 219:1-16 (Bernstein); Defs. Opp. to Mot. for Adverse

Inference at 7 ("[D]efendants concede their obligation to preserve all of plaintiff's medical records").)

93. Defendants have also conceded that the Consent Decree imports binding DOCS policies with respect to medical care and record-keeping. These requirements also are clear and unambiguous.

IV. The Evidence of Green Haven's Non-Compliance Is Clear and Convincing

The Evidence of Green Haven's Failure to Abide by the Specialty Care Provisions of the Consent Decree Is Clear and Convincing

94. The available medical records demonstrate, and defendants have not refuted, that Defendants' failure to refer Vera to a neurosurgeon despite the recommendations of his endocrinologists and others violated the following sections of the Consent Decree: VII(B) (obligation to send inmates to specialists when needed); VII(D) (3) (obligation to provide specialty care in a prompt manner, consistent with the severity of the inmate's condition); VIII(G) (obligation to document Green Haven doctors' responses to specialists' recommendations); and VI (obligation to ensure that an inmate whose diagnostic tests are

abnormal receives appropriate follow-up care). (See supra ¶¶ 26-31.)

95. The available medical records demonstrate, and defendants have not refuted, that Defendants' failure to refer Vera to an endocrinologist since May 2009 despite the endocrinologist's recommendation that he return for follow-up care violated the following sections of the Consent Decree: VII(B) (obligation to send inmates to specialists when needed); VII(D)(3) (obligation to provide specialty care in a prompt manner, consistent with the severity of the inmate's condition); VIII(G) (obligation to document Green Haven doctors' responses to specialists' recommendations); VIII(G) (where a specialist requests that an inmate be returned for follow-up care, provide that follow-up care or explain why it is not providing it). (See supra ¶ 32.)

96. The available medical records demonstrate, and defendants have not refuted, that Defendants' failure to refer Vera to an appropriate specialist after his losses of consciousness resulting in severe injuries violated section VII(B) (obligation to send inmates to specialists when needed) and VII(D)(3) (obligation to

provide specialty care in a prompt manner, consistent with the severity of the inmate's condition) of the Consent Decree. (See supra ¶ 33.)

97. The available medical records demonstrate, and defendants have not refuted, that Defendants' other failures to follow up on recommended care and to provide specialists with the appropriate documentation violated sections VII(B) (obligation to send inmates to specialists when needed); VIII(G) (obligation to document Green Haven doctors' responses to specialists' recommendations); and VI (obligation to ensure that an inmate whose diagnostic tests are abnormal receives appropriate follow-up care) of the Consent Decree. (See supra ¶¶ 34-35.)

98. Additionally, due to the Court's finding of an adverse inference, the missing records relating to specialty care -- including (a) the dozens of missing R&ROCs, (b) referrals to specialty care in the AHR that were not entered in FHS1 because they were not approved by the Regional Medical Director, and (c) documentation (or lack thereof) regarding decisions by Green Haven physicians to follow or disregard specialists' recommendations -- are assumed to

demonstrate violations of these provisions of sections VII and VIII of the Consent Decree. (See supra ¶¶ 36-38.)

The Evidence of Green Haven's Failure to Abide by the Medical Records Provisions of the Consent Decree Is Clear and Convincing

99. Defendants have conceded both that a substantial portion of Vera's records have been lost and that Defendants were negligent in losing the records. (Tr. 258:16-19 (Defendants' concession in oral argument that "there was some negligence"). As only employees of Green Haven's Medical Department were allowed to have access to inmates' medical records and as they were required to maintain these records (see supra ¶ 44), no alternate explanation besides Green Haven's negligence existed.⁶ As the Court suggested, the evidence of negligence is akin to res ipsa loquitur. (Tr. 259:15-17.)

⁶ Defendants abandoned an earlier unsupported and wholly implausible theory that Vera stole his own medical records. Compare Def. Opp. to Mot. in Limine at 7 (stating that "defendants are not seeking to have the Court draw any inference," including regarding the allegation of theft, from the missing medical records)), with Ex. 3, Bernstein Decl. ¶ 18 (suggesting that it is "certainly possible" that Vera could have stolen his medical records at a record review), and Def. Mem. of Law in Opp. to Mot. for Contempt at p. 13-14.

100. This negligent loss violated Defendants' obligation under section XIII(A) of the Consent Decree to "maintain an individual medical record for each inmate and fully document in the health record each encounter of the inmate with a health care provider" and to maintain the specific records enumerated in section XIII(A)(1)-(8) of the Consent Decree.

V. The Evidence Demonstrates That Green Haven Has Not Diligently Attempted to Comply with the Specialty Care and Medical Records Sections of the Consent Decree in Vera's Case

The Evidence Demonstrates That Green Haven Was Not Diligent in Attempting to Comply with the Specialty Care Provisions of the Consent Decree in Vera's Case

101. The available records indicate (and, pursuant to the adverse inference, the missing records are assumed to indicate) that Green Haven's failures to abide by the specialty care provisions of the Consent Decree were not merely technical violations but were significant departures from a proper standard of care.

102. Defendants repeatedly ignored the clear recommendations of specialists with expertise on Vera's condition and primary responsibility for

monitoring it. They repeatedly failed to coordinate his care and track it appropriately over time. And they ignored the fact that Vera's symptoms worsened throughout his incarceration. They also repeatedly refused to take Vera's complaints seriously, as when Dr. Chakravorty crumpled up Vera's list of symptoms and copies of medical records and as when, only two weeks before the May 2006 syncopal episode, Dr. Chakravorty documented his scorn for Vera's concerns. (See supra ¶ 33.)

103. Defendants' violations spanned a period of multiple years and violated several different provisions of the Consent Decree.

The Evidence Demonstrates That Green Haven Was Not Diligent in Attempting to Comply with the Medical Records Provisions of the Consent Decree in Vera's Case

104. The evidence demonstrates that Green Haven employees are not familiar with the provisions of the Consent Decree and DOCS policy as they relate to medical records. (See supra ¶¶ 48-53.) The evidence also demonstrates that the medical records procedures used by Defendants result in frequent temporary misplacement of records. (See supra ¶¶ 44, 67, 69-

72.) The evidence further demonstrates that, at the time Vera's records may have been lost, Defendants may have been in violation of the medical records staffing requirements of the Consent Decree. (See supra ¶ 52.)

105. The evidence demonstrates that Green Haven repeatedly failed to give Vera prompt access to his records and failed completely to give him access to his electronic records, even upon his specific request and reference to ongoing litigation. (See supra ¶¶ 64-67.)

The Evidence Further Indicates That -- Far from Showing Belated (and Legally Irrelevant) Diligence After Discovering the Loss of the Records -- Defendants Instead Retaliated Against Vera

106. The evidence indicates that Defendants did not discover the missing records until Vera's litigation, did not promptly inform Vera or the Court, did not contact at least Cossackie Specialty Care Clinic for copies of the missing records, and did not contact outside providers. (See supra ¶¶ 67-71.)

107. Far from taking Vera's condition and the loss of his medical records seriously, Defendants submitted a declaration that included at least two wholly

unsupported and spurious charges against Vera: (a) that there was "no evidence" that his May 2006 injuries resulted from a fall, instead of a fight, despite the existence of multiple medical and official prison records indicating that Vera lost consciousness; and (b) that Vera stole the medical records. (See supra ¶¶ 72-73)

108. The evidence further indicates that the charges by Green Haven disciplinary personnel that Vera's August 2009 injuries were payback for an extortion attempt -- dropped after a full hearing and the presentation of correctional officers as witnesses by Vera -- were intended as retaliation for Vera's lawsuit. (See supra ¶ 74.)⁷

VI. Vera Has Been Harmed by Defendants' Violation of the Consent Decree

109. The evidence indicates that Defendants' failure to provide Vera with the appropriate specialty care has caused Vera pain and damaged Vera's health, as both his symptoms and the tests of his condition have

⁷ That counsel for Vera were not provided with these records after multiple specific and detailed requests and multiple affirmations by Defendants that no such records existed only strengthens the inference that the charges were connected to this lawsuit. (Tr. 4:17-7:3.)

worsened over his incarceration at Green Haven. (See supra ¶ 12.) Indeed, the damage to Vera's health may be irremediable. (See supra ¶ 6.)

110. The evidence indicates that Defendant's loss of Vera's medical records and failure to provide his doctors with the appropriate records has impaired the continuity of care provided to Vera at Green Haven. (See supra ¶ 9.)

111. The evidence further indicates that the loss of Vera's medical records will continue to harm Vera, as the gap in his medical history will impair his doctors' ability to provide continuity of care in the future. (See supra ¶¶ 36-38.)

112. Finally, the evidence indicates that Defendants' failure to abide by the Consent Decree and subsequent retaliation against Vera for attempting to demand his rights under the Consent Decree has caused Vera years of fear for his health and constant anxiety.

113. Vera has experienced compensable damages as a result of Green Haven's violations. Pursuant to an agreement among the parties and the Court, upon a

finding of liability, Vera will establish the amount of his damages in a subsequent phase of litigation.

Counsel shall confer and inform the Court by letter no later than October 22, 2010 how they propose to proceed.

SO ORDERED.

Dated: October 15, 2010
New York, New York


LORETTA A. PRESKA
Chief U.S. District Judge